(1)

Supreme Court, U.S.
FILED

98 717 OCT 26 1998

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

Gary A. Bybee and Frances Bybee,
Petitoner(s).

v.

Commissioner of Internal Revenue Service,
Respondent.

On Petition For Writ Of Certiorari
To The United Sates Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Gary A. Bybee and
Frances Bybee
Post Office Box 789
Afton, Wyoming 83110
(307) 886-9322

Pro Se

92 pp

QUESTIONS PRESENTED

Whether Internal Revenue Service (I.R.S.) publications that are provided to taxpayers as guides for them to prepare tax forms are the official tax code and are binding on the Internal Revenue Service auditors and the United States Tax Court.

(1) The publications are printed and distributed in accordance with 26 U.S.C. §7802 and §7805 as authorized and budgeted by the United States Congress.

(2) The publications are printed and distributed by the Internal Revenue Service to taxpayers for use in preparing their tax forms. In this instant case Publication 334, Tax Guide For Small Business, was used as a tax reference guide for tax deductions, yet declared as not the official tax code by the Internal Revenue Service auditor and the United States Tax Court.

(3) The petitioners in good faith, utilized and followed Internal Revenue Service publications in their tax preparations for the years cited in this instant case, believing they were complying with the tax laws of the United States.

Whether the taxpayer who followed definitions of being in business according to 26 U.S.C.S. §195 and Internal Revenue Service regulations be declared to not be in business and have business tax deductions deleted when he has complied with the law(s) and completed the following:

(1) Files his tax returns on time denoting his business tax deductions.

(2) Has a profit motive even though no profit has been made.

(3) Has a plan of operation.
(4) Keeps records of research activities, expenditures, travel costs and contacts.
(5) Has complied with the Internal Revenue Code (IRC) and Internal Revenue Service regulations.

Whether the United States Tax Court should be required to eliminate/reduce interest charged by the Internal Revenue Service against the tax deficiencies cited in the Court's decision, that were incurred for excessive time delay by the United States Tax Court as in the instant case where Special Trial Judge Powell retained jurisdiction for over three years after his Court assigned duty of conducting a hearing had been completed and he did not submit his report in accordance with United States Tax Court Rule 183, Cases Involving More Than $10,000.

Whether the taxpayers who petition the United States Tax Court for redetermination of asserted tax deficiencies as in this instant case, have the right to face their accuser, the Commissioner of Internal Revenue Service, named a Respondent in the case.

Whether the United States Tax Court should be required to take corrective measurements in accordance with Federal Law(s) when there is evidence of:

(1) A fraudulent notice of deficiency.
(2) Violation of taxpayer's Civil Rights in an Internal Revenue Service Office by Internal Revenue Service Agents.
(3) Disregard of Court ordered stipulations by Internal Revenue Service attorneys that have been reported to the Court by petitioners..

Whether the United States Tax Court should be required to comply with the Internal Revenue Code and grant the

petitioners/taxpayers protection from levy for collection of taxes while the case is still pending before the Court in accordance with 26 U.S.C.S. §6213 c. Injunction to enforce stay and §7481 a(4) Decision remanded for rehearing, along with tax case law thereto.

Whether the United States Tax Court should accept the notice of deficiency as issued by the Internal Revenue Service to the taxpayer as true and correct without ascertaining the validity of the Court proceedings when there is proof of:

(1) When two of the tax years cited in the notice of deficiency were never audited.
(2) The computation of the deficiencies did not include credit for taxes already paid in through payroll deductions.
(3) The additions to tax included tax penalties never applicable to taxpayer such as stamp tax in this instant case.
(4) Abatement laws concerning deficiencies and additions to tax were not properly applied.

Whether the Tax Division attorneys of the United States Department of Justice who represent the Commissioner of Internal Revenue Service in this instant case appealed from the United States Tax Court are in violation of 26 U.S.C.S. §7214, offenses by officers and employees of the United States and 18 U.S.C.S. §1001 statements or entries generally, when they uphold the following Internal Revenue Service actions:

(1) Inclusion of two years in a notice of deficiency when proof existed that said years were never audited.
(2) Not allowing any recomputation of the asserted deficiencies in the notice of deficiency when proof existed they were inflated.
(3) Supporting the Internal Revenue Service contention

that IRS Publication 334, Tax Guide For Small Business, is not the official tax code even though it is printed in accordance with 26 U.S.C.S. using federal monies.

(4) Not complying with 26 U.S.C.S. §195 start-up expenditures and Internal Revenue Service regulations concerning the petitioner being in business and ignoring the Internal Revenue Service Agent's testimony of 03/13/96 when he stated in Court he did not know when business begins; yet eliminated all the petitioners' schedule C business tax deductions in the cited years of this instant case.

(5) Supporting the Internal Revenue Service when it was reported in the appeal that Internal Revenue Service agents had thrown petitioners' 26 U.S.C.S. §6661 abatement paperwork into the wastebasket without any review as required by law.

(6) Supporting the Internal Revenue Service notice of deficiency addition to tax; 26 U.S.C.S. §6653 Failure to pay stamp tax, when it did not apply to the petitioners.

Whether the United States Court of Appeals for the Ninth Circuit is denying justice to the petitioners when it states in their memorandum filed November 7, 1997, affirming the Tax Court's decision, that "Under the law of case doctrine, one panel of the appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case." Specifically:

(1) Whether it is the same case if petitioners are appealing a new decision issued by the Tax Court in regards to a remand order of the Appeals Court.

(2) Whether the case law cited by the Ninth Circuit, See Leslie Salt Co. v. United States, 55 F. 3d 1388, 1392

(9th Cir. 1995) prohibits reviewing the new testimony and evidence presented in remand trial, the new Tax Court decision entered as a result of a remand by the Appeals Court.

(3) Whether the above cited case precludes the appeals court from correcting any injustice(s) cited by the petitioners in their appeal in this instant case.

Whether the new public law 105-206 passed by Congress on 07/22/98 applies to this instant case wherein the Secretary (Commissioner of Internal Revenue Service) has the burden of proof in any court as to income tax liability; specifically that the notice of deficiency issued 09 September 1986 to the petitioners:

(1) Is not fraudulent in that it contained two tax years never audited (1982 and 1984) by the Internal Revenue Service.

(2) That the deficiencies cited are not inflated or fraudulent because taxes paid in through payroll deductions were never credited and no additional taxes were due.

(3) That the additions to tax, section 6653, Failure to pay stamp tax never applied to the petitioners and should not have been cited.

(4) That the additions to tax, Section 6661, Substantial Understatement of Taxes, repealed in 1989, never applied to the petitioners and should have been deleted after the Internal Revenue Service agents/ attorneys/officials refused to process and review the penalty abatement application paperwork, and as the agent stated, he "just threw it in the wastebasket."

PARTIES TO THE PROCEEDINGS

Petitioner:	Gary A. Bybee Frances Bybee Pro Se
Respondent:	Commissioner of Internal Revenue Service

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding vi

Table of Contents vii

Table of Citations viii

Opinions Below 1

Statement of Jurisdiction 2

Statutes and Rules Involved 2

Statement of Case 4

Reasons for Granting the Writ 15

(1) Being In Business 15

(2) Additions To Tax Cited, 26 U.S.C.S. 16
Section 6653
Failure to pay Stamp Tax

(3) Additions to Tax 26 U.S.C.S. 18
Section 6661
Substantial Understatement of Liability
(Repealed 1989)

(4) Appeal to 30 Day Letter, Answer Stating Tax Years 1982 and 1984 were Never Examined 19

(5) Motion to Restrain the Assessment or Collection to Taxes While In Court Before the Tax Court's Final Decision Denied 20

Contents

Page

(6) Interest Required To Be Paid Because Of Tax Court's 3 1/2 Year Delay Of The Case 21

(7) Validity Of Notice Of Deficiency 22

Conclusion 25

TABLE OF CITATIONS

Cases Cited:

Allen v. Commissioner, 925 F. 2d 348, 353 (9th Cir. 1991) 15A

Bankers Pocahontas Coal Co. v. Burnet (1932) 287 US 308, 77 L Ed 325, 53 S Ct 150, 3 USTC 71 998, 11 AFTR 1089 ..... 37A

Bybee v. Commissioner, No. 93-70942, unpublished memorandum disposition (9th Cir. July 26, 1997), 29 F. 3d 630 (9th Cir. 1994) 3A, 6A, 7A, 9A

Commissioner v. Goulder (1941, CA6) 123 Fwd 686, 41-2 USTC ¶9777, 28 AFTR 392 23

Commissioner v. Groetzinger, 480 U.S. 23, 36 (1987) 23A

Commissioner v. Linderman (1934, CA3) 84 F2d 727, 36-2 USTC ¶9428, 18 AFTR 199, cert den 299 US 589, 81 L Ed 434, 57 Ct 116 23

Contents

Page

Commissioner v. McCoy, 484 U.S. 3, 6 (1987) 17A

Commissioner v. Montague (1942, CA6) 126 F2d 948, 42-1 USTC ¶10162, 29 AFTR 47 24

Commissioner vs S.A. Woods Mach Co. (1932) CA 1 57 F2d 635, 3 U.S.T.C. §924, 11 AFTR 25, cert den 287 US 613, 77L Ed 532, 53 Sct 15. 18

Commissioner v Shapiro (1976) 424 U.S. 614, 47 L Ed 2d 278, 96 S Ct 1062, 76-1 U.S.T.C. II 9266, 37 AFTR 2d 76-959. 20

Condor Int'l, Inc. v. Commissioner, 78 F. 3d 1355, 1358 (9th Cir. 1996) 2A

Dean v. Commissioner, 56 T.C. 895, 902 (1971) ... 24A, 25A

Deputy v. DePont, 308 U.S. 488, 493 (1940) 22A

Edwards v. Commissioner, 680 F. 2d 1268,1269 (9th Cir. 1982) 12A

Freytag vs Commissioner, 501 U.S. 868, 115 L Ed 764, 111 S Ct 2631 (No. 90-762)..... 11, 34A, 37A

Goodwin v. Commissioner, 75 T.C. 424, 433 (1980), and without published opinion 691 F. 2d 490 (3d Cir. 1982)..... 23A

Contents

Page

Gunn v. Mathis, (1957, WD Ark) 157 F Supp 169, 58-1 USTC II 9136, 58-1 USTC II 9201, 1 AFTR 2d 308, 1 AFTR 2d 560. 21

Hardy v. Commissioner, 93 T.C. 684, 687 (1989) 23A

Heasley vs Commissioner, (1990. CA 5) 902 F 2d 380, 90-1 U.S.T.C. S 50314, 66 AFTR 2d 90-5068. 19

Helvering v. Richter (1941) 312 US 561, 85 L Ed 1043, 61 S Ct 723, 41-1 USTC ¶9323, 25 AFTR 1202 23

Hormel v. Helvering (1941) 312 US 552, 85 L Ed 1037, 61 S Ct 719, 41-1 USTC ¶9322, 25 AFTR 1198 23

Industrial Research Products, Inc. v. Commissioner, 40 T.C. 578, 590 (1963). 24A

Jackson v. Commissioner, 864 F. 2d 1521 (10th Cir. 1989) affg. 86 T.C. 492 (1986) 23A

Kamholz v. Commissioner (1990) 94 TC No. 2 21

Kantor v. Commissioner, 998 F. 2d 1514, 1518 (9th Cir. 1993) 12A, 13A, 14A

Legg's Estate v. Commissioner (1940, CA4) 114 F2d 760, 40-2 USTC ¶9683, 25 AFTR 717 24

Leonhart v. Commissioner (1969, CA4) 414 F 2d 749, 69-2 USTC II 9597, 24 AFTR 2d 69-5452. 17

Contents

Page

Leslie Salt Co. v. United States, 55 F. 3d 1388, 1392 (9th Cir. 1995) ..... iv, 3A

Licari v. Commissioner (1946) F2d 690, 692 N. 3 (9th Cir. 1991) 16A

McKinley vs. Commissioner (1978) TC Memo 1978-428, 37 TCM 1769. 17

McManus v. Commissioner, T.C. Memo. 1987-457 effd. without published opinion 865 F. 2d 335 (4th Cir. 1988) 23A

Neely v. Commissioner, 85 T.C. 934, 947 (1985) 25A

New Colonial Ice Co. V. Helvering, 292 U.S. 435 440 (1934) 22A

Norgaard v. Commissioner, 939 R. 2d 874, 877 (9th Cir. 1991). 15A, 16A, 17A

Pino v. Commissioner, T.C . Memo 1987-28 ..... 24A

Goldman v. Commissioner, T.C. Memo 1975-138 ..... 24A

Redhouse v. Commissioner, 728 F. 2d 1249, 1253 n.2 (9th Cir.) cert. denied, 469 U.S. 1034 (1984) 17A

Remuzze vs. Commissioner (1989) CA 4 867 F 2d 609 16

Page

Reo Motors, Inc. v. Commissioner (1955, CA6) 219 F2d 610, 55-1 USTC 71 49090, 46 AFTR 1740 ..... 23, 39A

Richmond Television Corp. v. United States, 345 F. 2d 901, 907 (4th Cir. 1965) 24A, 25A

Ross v. Commissioner (1942, CA5 Tex) 129 F2d 310, 42-2 USTC 71 9593, 29 AFTR 829 ..... 39A

Scar v. Commissioner, 814 F. 2d 1363, 1368-70 (9th Cir. 1987) 12A

Seaman vs. Commissioner (1965) TC Memo 1965-19, 24 TCM 78 ..... 17, 18

Smith v. Commissioner, 800 F. 2nd 930, 933 (9th Cir. 1986) 13A

Strother v. Burnet (1932) 287 US 314, 77 LED 330, 52 S Ct 152, 3 UST 71 999, 11 AFTR 1091 ..... 37A

Tehan v. Commissioner (1961, CA7) 295 F2d 895, 61-2 USTC 71 9736, 8 AFTR 2d 5723 ..... 22, 39A

Transport Mfg. & Equipment Co. v Commissioner, (1967, CA8) 374 F2d 173, 67-1 USTC 71 9293, 19 AFTR 2d 889, later app (CA8) 421 F2d 729, 70-2 USTC 71 9604, 26 AFTR 2d 70-5501 ..... 38A, 39A

Other Authorities Cited:

Internal Revenue Code (26 U.S.C.S.):

Page

§195 ..... i, iv, 15, 22A, 41A

§6213 ..... iii, 20, 42A

§6214 ..... 37A

§6653 ..... iv, v, 16 - 18, 15A, 43A

§6661 ..... iv, v, 18, 19, 15A, 16A, 17A, 27A, 43A

§6404 ..... 18, 43A - 46A

§7214 ..... iii, 46A

§7802 ..... i, 47A, 48A

§7805 ..... i, 49A

18 U.S.C.S.

§1001 ..... iii, 47A

MISCELLANEOUS:

Page

Public Law 105-206. 07/22/98
Title III Subtitle A. Burden of Proof ..... iv, 24, 51A

IRS Publication 334,
Tax Guide For Small Business ..... i, iv, 5, 9, 11

U.S. Tax Court Rule 183 ..... ii, 50A

OPINIONS BELOW

The denial of motion for the rehearing of the United States Court of Appeals for the Ninth Circuit filed July 30, 1998 is produced at p. 1a of the Appendix. The memorandum, appeal from the United States Tax Court as filed by the United States Court of appeals for the Ninth Circuit filed November 7, 1997 is reproduced at pp. 2a-3a of the Appendix. The final decision of the United States Tax Court is reproduced at p. 4a of the Appendix. The order by the United States Tax Court that the previous decision entered by the United States Tax Court entered May 25, 1993 is to be vacated and set aside is reproduced at p. 5a of the Appendix. The United States Tax Court supplemental memorandum findings of fact and opinion is reproduced at pp. 6a-9a of the Appendix. The United States Tax Court order calendaring the hearing pursuant to the remand by the Ninth Circuit is reproduced at p. 10a of the Appendix. The United States Court of appeals for the Ninth Circuit memorandum appeal from the United States Tax Court is reproduced at pp. 11a-17a of the Appendix. The United States Tax Court decision entered May 25, 1993 is reproduced at p. 18a of the Appendix. The United States Tax Court memorandum findings of fact and opinion is reproduced at pp. 19a-27a of the Appendix. The United States Tax Court order denying the petitioners' oral motion to continue is reproduced at p. 28a of the Appendix. The United States Tax Court order that the Respondent's motion for production of documents is Denied on July 18, 1998 is reproduced at p. 29a of the Appendix. The Respondent's answer to petition filed in the United States Tax Court by petitioners is reproduced at pp. 30a-31a of the Appendix. The petitioners' motion to correct/delete interest for thirty-six months to the United States Tax Court, denied November 6, 1996 is reproduced at pp. 32a-40a of the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit on November 7, 1997 filed the memorandum, appeal from the United States Tax Court that affirmed the Tax Court decision entered September 17, 1996. The petition for rehearing was denied July 30, 1998.

The Court has jurisdiction under 28 U.S.C. §1254 (1). Jurisdiction of the Ninth Circuit was proper pursuant to 26 U.S.C. §7482.

The Internal Revenue Service (IRS) issued a notice of deficiency to Gary A. Bybee and his wife, Frances Bybee (taxpayers) on September 9, 19986 with respect to taxable years 1982, 1983 and 1984.

They (Gary A. & Frances Bybee) filed a petition in the Tax Court on November 10, 1986 seeking a redetermination of the asserted deficiencies and additions to tax.

The petition was timely pursuant to Internal Revenue Code (IRC) §6213. The Tax Court had jurisdiction over the petition pursuant to I.R.C. §6213, 6214 and 7442.

STATUES AND RULES INVOLVED

This case involves Sections of 26 U.S.C.S., The Internal Revenue Code, 18 U.S.C.S. Section 1001 and Rule 183 of the United States Tax Court, Rules of Practice and Procedure. All are reproduced in The Appendix beginning with p. 41A.

26 U.S.C.S.

§195 Start Up Expenditures

§6213 Restriction Applicable To Deficiencies; Petition to Tax Court.

§6653 Failure to Pay Stamp Tax
§6661 Substantial Understatement of Liability, Repealed in 1989.
§6404 Abatements
§7214 Offenses by Officers and Employees of The United States

18 U.S.C.S.
§1001 Statements or Entries Generally

26 U.S.C.S.
§7802 Commissioner of Internal Revenue; Assistant Commissioner (Employee Plans and Exempt Organizations)
§7805 Rules and Regulations
U.S. Tax Court, Rules of Practice and Procedure
Rule 183. Cases involving more than $10,000.
Public Law 105-206 Revising The Internal Revenue Tax Code passed by Congress 07/22/98
TITLE III Taxpayer Protection and Rights.
SUBTITLE A: Burden of Proof.

STATEMENT OF THE CASE

During tax years 1982, 1983, and 1984, Appellant/ Petitioner Gary A. Bybee was in business of research and development of methods and procedures to safely transport and dispose of toxic and low level nuclear wastes.

Gary A. Bybee is a retired Air Force officer. Dr. Frances Bybee, his wife, was at that time a public school Principal in Wyoming. They filed joint income tax returns.

The Appellants filed a petition on 11/10/86 with The United States Tax Court for review and deletion of the Internal Revenue Service (IRS) notice of deficiency issued 9 September 1986. See Tax Court record Docket Entry (CR 0001).

There were two trials and one hearing held in the United States Tax Court during the last twelve years. There were two appeals made to the United States Court of Appeals for the Ninth Circuit.

The first hearing in the Tax Court was held on 05/05/88 (CR 0017) in response to the Respondent's motion for production of documents and the Petitioners' motion for protective order.

There was a three year delay by the Tax Court until the trial which was held on 03/10/92 (CR 0030).

After the initial Tax Court decision of May 25, 1993, (CR 0038), an appeal was made to The United States Court of Appeals for the Ninth Circuit. The Appeals Court on 01/06/ 95, (CR 0056) remanded back to the United States Tax Court, the problem of whether the notice of deficiency issued on 9 September 1986 had been issued within the three year statute of limitation for tax year 1982; which had expired 15 April 1986. (CR 056).

A trial was held on 03/13/96 (CR 0076) concerning the remanded problem. Tax Court Judge Swift entered a

supplemental memorandum opinion on 09/12/96 (CR 0081), in favor of the Respondent. Judge Swift then ordered the initial Tax Court decision entered 05/25/93 vacated and set aside. (CR 082). He then entered a new decision; again in favor of the Respondent, on 09/17/96 (CR 0083).

The new Tax Court decision of 09/17/96 (CR 0083), is based on the memorandum opinion entered 05/25/93 (CR 0037) and the supplemental memorandum opinion entered 09/12/96. (CR 081)

The taxpayers/petitioners appealed the entire case DeNovo because of the new Tax Court decision of 09/17/96 (CR 0083). The Ninth Circuit Court of Appeals denied our appeal on Nov. 7, 1997 and our petition for rehearing on July 30, 1998 (copy included, page 1A of Appendix).

Taxpayers Gary A. and his wife, Frances Bybee, cited or referred to in their petition to the United States Tax Court (CR 001) the following:

- That Internal Revenue Service Agent Seay who audited their 1983 tax year return on 06 February 1985, disallowed all of the schedule C to the tax form 1040, Business Tax Deductions.
- Internal Revenue Service Agent Seay stated that the Department of Treasury Publication 334, Tax Guide For Small Business, was not the official tax code and could not be used as a reference guide for tax deductions. We had used Internal Revenue Service Publication 334 as a tax deduction guide for all three tax years cited in our case; 1982, 1983 and 1984.
- That on 19 November 1985 a meeting was held in the Internal Revenue Service office to discuss the "audit" procedures of Agent Seay. Present at the meeting were Mr. Seay; his supervisor, Mr. Shephard; and Mr. Renz, The Chief of Examination for Wyoming and often Acting - District Director. When I (Gary) would

not submit to Mr. Renz's demand that I sign an extension agreement to extend the audit time for tax year 1982, Mr. Renz stated I was not to be allowed to leave the room until I decided to sign the extension agreement. When the threat of imprisonment subsided and emotions returned to normal and I still would not sign, Mr. Renz stated it did not matter; "I'll just issue a notice of deficiency and extend the case forever." He did issue the notice on 09 September 1986 when he was Acting- District Director.

- That on 25 May 1986, we submitted to the Internal Revenue Service Appeals Office, in accordance with Internal Revenue Service Publication #5, an appeal to the 30 day letter outlining the "audit" and deficiencies for tax years 1982, 1983, and 1984. No answer was ever received. On 09/16/86, Internal Revenue Service employee, Marilyn Beeman, at our request, searched our files in the Cheyenne, Wyoming District Office for an answer to our appeal. She stated there was no record of our appeal except a memo from the Denver Internal Revenue Service Appeals Office. The memo, Internal Revenue Service Form 5402-Appeals Transmittal Memorandum and Supporting Statement, stated, "Appeals cannot accept jurisdiction of the 8212 or 8412 years because they were never examined. . ."

The entire content of the memo was read into the Tax Court record on March 13, 1996 during questioning of an Internal Revenue Service Agent (CR 0079 at 74-80).

We cited in the petition that the two tax years 1982 and 1984 were never examined yet included in the notice of deficiency.

- That no additional taxes are owed. It should be noted that the deficiencies cited in the notice of deficiency

were inflated by 100% as taxes already paid in through payroll deductions were never credited against the deficiencies (specifically $5,872.36 for 1983 alone) (CR 0079 at 60-67).

Additionally, had the Tax Court allowed a recomputation of the deficiencies (motion denied [CR 0079 at 82]) on 03/12/96, it would have revealed that there was no deficiency for tax years 1982, 1983 or 1984 and a refund totaling $2,839.00 was due. (Amendment to Petition for Rehearing, Ninth Circuit Court of Appeals.)

Denver was selected as the trial site because the taxpayers had to pay the expenses of the Internal Revenue Service agents and officials living in Wyoming that were to be subpoenaed to testify at the trial. (CR 0002)

They were expected to testify as to:

- The elimination of all schedule C business tax deductions from tax form 1040 for all three tax years 1982, 1983 and 1984 because Gary Bybee could not be considered to be in business because they stated he did not have a college degree in the field of endeavor and that the tax deductions were only considered to be start-up costs.
- The meeting held in Cheyenne, Wyoming on 19 November 1985 and the attempted forced signing of the extension form for 1982 tax year audit.
- The appeal of 25 May 1986 to the Internal Revenue Service Appeals Division and no answer ever being received along with the fact that there was no record of the appeal in our file except the memo 5402 which had been sent from the Denver appeals office which obviously had reviewed our appeal.
- That memo form 5402 stated 8212 and 8412 tax years were never examined yet included in the notice of deficiency.

Taxpayers filed a petition with the Tax Court November 10, 1986. Respondent's answer to our petition dated January 8, 1987, admitted there was a meeting and who attended on 19 November 1985. Also admitted was the fact that form 5402 states that 8212 and 8412 years were not examined (CR 0003 at 2).

The Respondent filed a motion to compel the production of documents on 05 January 1988 (CR 0007). It requested documents for tax year 1981 to present, not just the three years in the case.

We, the Petitioners, filed a motion for a protective order (CR 008).

United States Tax Court Judge Fay called Gary A. Bybee at his home in Layton, Utah and in conference with Attorney Anderson of the Denver IRS District Counsel Office, strongly suggested that Bybee request a change of trial site to Salt Lake City and to "not let any grass grow under your feet." On January 19, 1988 the request was filed (CR 0009).

On May 5, 1988 a hearing was held before Tax Court Special Trial Judge Powell. He required us to produce for audit, all three tax years, 1982, 1983 and 1984 and submit a joint report with the Internal Revenue Service of the results of the audit. (CR 0018 at 14).

During the hearing taxpayers discussed:

(a) The appeal of the 30 day letter concerning deficiencies to the Internal Revenue Service and no answer ever being received.

(b) The form 5402 stating that 1982 and 1984 were never audited.

(c) That there was no mention of tax year 1983 that we had appealed to the Internal Revenue Service Appeal Division.

Special Trial Judge Powell stated the Tax Court has jurisdiction because there was a notice of deficiency and a

petition filed. He stated,

> "ordinarily we do not go behind what is in that notice. We are concerned with the issues that are involved that are raised by the notice of deficiency. . .and quite frankly, under the rules of this court, they are not particularly relevant." (CR 0018 at 5).

I stated I used Publication 334, (Tax Guide for Small Business) as a reference guide for business tax deductions (for schedule C to tax form 1040). The Internal Revenue Service Agent who audited our 1983 tax form stated the publication was not the official tax code and could not be used as a tax deduction reference guide. The United States Tax Court Judge sustained that the Internal Revenue Service publications were not the official tax code (CR 0018 at 6).

Again the Judge stated, "what happened before with the Internal Revenue Service agent is not a matter before this Court. . ." (CR 0018 at 7).

The Court stated,

> "The code is contained in these volumes. What Respondent may interpret the code. . . or what the Commissioner may interpret the code. . .he puts out pamphlets in an attempt to help people. But that is not the law. . ." (CR 0018 at 11).

We used Internal Revenue Service publications to prepare our tax returns and believed we were complying with the law.

Again the Court stated,

> "his (Commissioner's) revenue rulings are not binding on me. They are his view of it. And simply because he may have stated something that you interpret in a way of allowing deductions is not going to control this issue." (CR 0018 at 12).

Mr. Kennedy, the Respondent's Internal Revenue Service attorney discussed profit motive to allow business deductions. (CR 0018 at 8).

Taxpayers had a profit motive and were conducting research on the project to make a profit.

Special Trial Judge Powell ordered all schedule C records for 1982, 1983 and 1984 to be produced for audit. (CR 0018 at 14).

The records were produced for review by the Internal Revenue Service agent designated. He only wanted to verify receipts and checks in comparison to the deductions taken on the schedule C. He refused to review: any daily logs or travel reports concerning trips taken, their purpose, who was contacted or where; because as he stated, they were all written in the same color ink. The receipts and checks were verified in comparison with the tax deductions in the amount of 81% for 1982; 100% for both 1983 and 1984.

We complied with the order and the joint return was filed June 17, 1988. (CR 0020)

After the joint report was filed, Special Trial Judge Powell issued an order of July 18, 1988 (CR 0021) denying the Respondent's motion to compel production of documents. The joint report containing the records produced for tax years 1982 and 1984 that the Internal Revenue Service had not audited prior to issuing the notice of deficiency was, and still is , part of the Court record. The Respondent refers to the figures in briefs (CR 0033) and motions. Tax Court Judge Clapp referred to the figures in his memorandum opinion (CR 0037).

Special Trial Judge Powell also restricted us from "entering any evidence not heretofore produced pursuant to Respondent's motion to compel production of documents."

This order protected the IRS from us entering into evidence that prior to 1982, we were licensed by the State of Nevada in the field of low level nuclear waste transport.

It specifically states in the Tax Court Order of 03/09/88 (CR 0016) Special Trial Judge Powell was assigned for the purposes of conducting the hearing for the production of documents. Special Trial Judge Powell's involvement in our case ended after he held the hearing on the IRS motion for production of documents and the required joint report of the Court ordered audit of the three years (1982, 1983 and 1984) was filed on 06/17/88 (CR 0020).

He retained jurisdiction of our case and withheld it from trial for over 3 years; 05/05/88 to 08/09/91; all because he was cited in a case before the U.S. Supreme Court in FREYTAG vs. COMMISSIONER decided 27 June 1991.

Neither Tax Court Judge Clapp or Judge Swift would remove the interest charges by the Internal Revenue Service (some $21,000) for the over three year delay of our case by Special Trial Judge Powell (CR 0075) (CR 079 at 81).

The Brief for Respondent filed with the Court on May 29, 1992 (CR 0033) states that the joint report sets forth the parties agreement of verified tax deductions that are indeed deductible. This would be giving us full credit for all of our business schedule C tax deductions except those designated Personal Expenses as singled out by the Court ordered Internal Revenue Service audit of 1988. Had Agent Seay compared our schedule C tax deductions with Internal Revenue Service Publication 334, Tax Guide For Small Business, and eliminated only those deductions considered personal expenses, as did the audit of the three tax years as ordered by Special Trial Judge Powell, the "deficiencies" would be:

1982 No Deficiency; a Refund of $1,539.00
1983 No Deficiency; a Refund of $ 340.00
1984 No Deficiency; a Refund of $ 960.00
Total for the 3 years; a Refund due of $2,839.00

These figures were reported in the amendment to petition for rehearing to specify that no deficiencies were due if

proper credit was given if the recomputation had been allowed by the Tax Court.

A trial was held before United States Tax Court Judge Clapp II on March 10, 1992.

The joint report concerning the audit of the tax year 1982, 1983 and 1984 as ordered by Special Trial Judge Powell and filed June 17, 1988 was received as joint Exhibit 1-A for purposes of trial, briefing, and opinion in this instant case and made part of the record (CR 0032 at 14-15).

Petitioners made an oral motion for a one year continuance to meet with the Commissioner of the Internal Revenue Service in hopes of resolving the case and several key issues in this instant case. These included: (a) Violations of Civil Rights; (b) The abuses of Internal Revenue Service agents against taxpayers at all levels during an audit; (c) The Internal Revenue Service publications being given to taxpayers as tax deduction references and instructions and then being told during an audit the publications are not the official tax code; that they can not be used as a tax reference guide; (d) Most importantly, the issuance of a fraudulent notice of deficiency with inflated deficiencies and containing two tax years that were never audited, as confirmed by the Internal Revenue Service Appeal Division.

The motion was denied (CR 0032 at 20-26). We were not allowed to face our accuser. Again the Judge stated that - Internal Revenue Service publications are not the law of the land (CR 0032 at 24).

Petitioner Gary Bybee was required to take the stand as a witness against himself, which he did. Respondent's attorney was allowed to cross-examine petitioner as to being in business, objectives, research that had been done and that a field of professionals had been contacted to be on call in their area of expertise to support the business; experts such as water sampling, five nuclear scientists, and a weather fore-

casting service to name a few. The petitioner refused to specifically name each of the individuals as Special Trial Judge Powell had ordered in 1988 that no further evidence could be introduced. Judge Clapp II had earlier stated, "I don't care what Judge Powell said," (CR 0032 at 8) but he never rescinded Judge Powell's order.

The Tax Court's decision was entered against Petitioners on 05/25/93. (CR 0038)

On July 26, 1994, the United States Court of Appeals for the Ninth Circuit filed its memorandum in which it affirmed in part, vacated, and remanded in part. It required the Tax Court to review if tax year 1982 was included in the notice of deficiency after the three year statute of limitation for audit had expired. (CR 0056).

A trial was held in Salt Lake City, Utah before Tax Court Judge Swift on 03/13/96. Respondent's attorney introduced a copy of a form 872, Consent to Extend the Time to Assess the 1982 tax year that was supposedly "signed" by the petitioners on December 12, 1985. We had never seen this form until it was introduced. No reasonable man would have signed such a statement to extend the audit time (after it had expired) for tax year 1982 and particularly after the attempted imprisonment of petitioner in an Internal Revenue Service office by IRS agents on 19 November 1985, because the petitioner would not sign an extension agreement for the expired 1982 tax year. The attempted imprisonment occurred some three weeks before Form 872 was supposedly signed by the Petitioners.

Internal Revenue Service Agent Seay, who audited Petitioners' 1983 tax return and who falsified the audits of tax years 1982 and 1984 testified:

(1) He did not remember asking for $5,000.00 "not to come back."

(2) He did not know when business began. He thought business began when a profit was made. (He had been an IRS auditor for fourteen years.)

(3) He had never read or fully read IRS publication 334, Tax Guide For Small Business, which he had declared in 1985, not the official tax code and could not be used as a tax reference guide.

(4) He had not given credit for taxes paid in through payroll deductions when computing the deficiencies.

(5) He was not in the room on 19 November 1985 when Mr. Renz ordered that the Petitioner would not be allowed to leave the room until he decided to sign the 1982 audit extension form; that he was out of the room getting the form (which he was not.) (CR 0079 pps. 39-69).

At the close of the evidence on the remanded issue, the Judge denied taxpayer's following motions:

(1) Motion (CR 0075) to correct/delete interest as a result of Special Trial Judge Powell's over three years delay of the case (CR 0079 at 81).

(2) Oral motion to reconsider the original opinion with respect to finding that taxpayers were not engaged in trade or business during the yeas at issue (CR 0079 at 82).

(3) Oral motion to the Court to have the computation of deficiencies reviewed, which were never allowed by Judge Clapp II (CR 0079 at 82).

(4) Motion filed 06/08/95 (CR 0068) to have the Internal Revenue Service restrained from assessment and collection during the time the petition was before the Court pending final decision (CR 0079 at 82-84).

It should be noted that contradictory to tax law, the tax liens filed against the Petitioners remained in effect during the remand by the Appeals Court. United States Tax Court

Judge Swift denied the motion for removal of liens during the Court proceedings even though a final decision had not been made in the case. The liens were ordered released by the United States Department of Justice Tax Division on 02 July 1997, because they were "improper". (Brief for Appellee to the United States Court of Appeals for the Ninth Circuit, 09 July 1997, p. 46).

REASONS FOR GRANTING THE WRIT

There are seven specific areas in reference to our cited questions that are clarified below; particularly by tax case law which we presented to the Tax Court and Appeals Court.

(1) Being In Business. The definition of a taxpayer being in business is in accordance with 26 U.S.C.S. §195 start-up expenditures.

> 26 U.S.C.S. §195. Start-up expenditures.
>
> (c) Definitions. For purposes of this section -
>
> (2) Beginning of trade or business. (A) In general. Except as provided in subparagraph (B), the determination of when an active trade or business begins shall be made in accordance with such regulations as the Secretary may prescribe.
>
> (B) Acquired trade or business. An acquired active trade or business shall be treated as beginning when the taxpayer acquires it.

IRS Regulation. The IRS regulation specifying the time business begins states that the taxpayer files a return for that tax year.

We filed our tax returns on time for each tax year

and therefore complied with the tax law for being in business.

The only requirement that the IRS has for being in business is to file a tax report for the year business begins or is purchased. No written statement is required from the Commissioner of IRS to state business has begun. There only has to be a profit motive if no profit has been made as yet.

In this instant case we had a profit motive. We had a net operating loss for the three years and had not made a profit.

Case Law states:

> Taxpayer need show only sincere and honest or bona fide profit motive and it is unnecessary for taxpayer to show reasonable profit motive. Remuzze vs Commissioner (1989) CA 4 867 F 2d 609.

There is no reference or authority in the Tax Law 26 U.S.C.S. that an IRS agent (nor the Tax Court) can revoke when a business begins operations.

The IRS agent who stated we were not in business and who eliminated our schedule C business tax deductions during his audit of our 1983 tax year return, the basis for the notice of deficiency, stated on 03/13/96 when he testified in Tax Court that he did not know when business begins according to tax law. He thought business began when a profit was made. His testimony was eleven years after he audited our 1983 return. (CR 0079 at pps. 46-49)

He eliminated all our business tax deductions without knowledge of the tax law or authority to reverse our being in business to take tax deductions.

(2) Additions to tax cited.

26 U.S.C.S. Section 6653. Failure to pay Stamp

Tax. We were cited with this negligence penalty even though we were never required to pay any stamp tax.

One has to be in a specific kind of business in order to be required to pay a stamp tax. We were in the business of Research and Development of Methods and Procedures to Safely Transport and Dispose of Toxic and Low Level Nuclear Wastes. We were not required to pay a stamp tax. To substantiate our allegation, a case is cited as follows: 26 U.S.C.S. §6653,

> Persons liable. 26 U.S.C.S. §6653(a) penalty falls on taxpayers who have duty to pay tax. Leonhart v. Commissioner (1969, CA4) 414 F 2d 749, 69-2 USTC II 9597, 24 AFTR 2d 69-5452.

Additionally, the IRS and the Tax Division of The Department of Justice claimed we were not in business, so how could we be cited with this negligence penalty that requires one to be in a specific type of business to pay a stamp tax?

> U.S.C.S. §6653.3. Defenses. 27. Dispute with IRS. No part of tax underpayment is due to negligence or intentional disregard of rules and regulations where most of adjustments made in years at issue resulted from personal expenses which had been claimed as business deductions and about character of which there was bona fide dispute. Seaman vs. Commissioner (1965) TC Memo 1965-19, 24 TCM 78. Taxpayers will not be subject to negligence penalty where disallowance of travel expense deductions was made only after complicated determination of whether or not deduction was allowable. McKinley vs Commissioner (1978) TC Memo 1978-428, 37 TCM 1769. U.S.C.S. 6653. 26. Mistake of Law. Negligence penalty should not be imposed on taxpayer on

honest view of law, though such view was obviously untenable. Commissioner vs S.A. Woods Mach Co. (1932) CA 1 57 F2d 635, 3 U.S.T.C. §924, 11 AFTR 25, cert den 287 US 613, 77L Ed 532, 53 Sct 15.

U.S.C.S. § 6653. 3. Defense. 27. Dispute with IRS. No part of tax underpayment is due to negligence or intentional disregard of rules and regulations where most of adjustments made in years at issue resulted from personal expenses which had been claimed as business deductions and about character of which there was bona fide dispute. Seaman vs Commissioner (1965) TC Memo 1965-19.

(3) Addition To Tax. 26 U.S.C.S. Section 6661 Substantial Understatement of Liability (Repealed in 1989).

After the Tax Court decision of 05/25/93, we submitted our paperwork for abatement of penalties in accordance with IRS directives and 26 U.S.C.S., 6404(a) (1) (2) (3) and (f).

The specific additions to tax penalties were under Section 6661 "Substantial Understatement of Liability" which was repealed in 1989 and Section 6653 (Failure To Pay Stamp Tax) which did not even apply to our case. We submitted the required IRS From 843 ("Claim For Refund and Request For Abatement") for each tax year.

We also submitted three Form 1040's, Amended U.S. Individual Income Tax Return. The paperwork was recorded on our record in the IRS Computer as Code 977; Amended Return: 01/18/94.

The abatement request paperwork was transferred from the IRS Problem Resolution Staff to the IRS Appeals Office, and then the Salt Lake City IRS District Counsel Office. IRS Attorney Mark Barnes,

who represented the Respondent in the two Tax Court trials, held the paperwork for months. When we attempted to trace the paperwork, he forwarded it to Mr. Bernard C. Rollins, (telephone number (801) 524-6971) who on 06 May 1994, stated he took no action and just threw the paperwork in the wastebasket.

U.S.C.S. 6661. Interpretive Notes and Decisions. IRS abuses its discretion by failing to waive substantial understatement pentaly where tax payers make good faith attempt to self-assess correct tax liability. Heasley vs Commissioner (1990, CA 5) 902 F 2d 380, 90-1 U.S.T.C. S 50314, 66 AFTR 2d 90-5068.

(4) On 25 May 1986 taxpayers mailed their appeal to the IRS 30 day letter outlining the deficiencies of tax years 1982, 1983 and 1984, in accordance with IRS Publication 5. No answer was ever received. (CR 0017 p. 2)

A Notice of Deficiency containing tax years 1982, 1983, and 1984 dated 09 September 1986, was received by the taxpayers at their home in Whiteriver, Arizona. A telephone call was made to the IRS office in Cheyenne on 16 September 1986 to check on the status of our appeal. Marilyn Beeman searched our file and found no record of our appeal except IRS Form 5402 dated June 25, 1986. Upon our request she sent us a copy. Form 5402 stated:

"JURISDICTION NOT ACCEPTED."
"COPY FORM 2973 PLACING CASE IN STATUS 20 ATTACHED."
"APPEALS CAN NOT ACCEPT JURISDICTION OF THE 8212 & 8412 YEARS BECAUSE THEY WERE NOT EXAMINED.

IT IS SUGGESTED A STATUTORY NOTICE BE ISSUED ON THOSE YEARS UNLESS THE TAXPAYER PERMITS AN EXAMINATION OF THOSE RECORDS." "RETURN RECEIPT REQUESTED. (CR 0003 p. 2) and (Excerpts of Record, p.2) and (CR 0079 at pps. 74-75).

All trace of our 25 May 1986 appeal for tax years 1982, 1983 and 1984 appeal had been removed from the file and or destroyed so a fraudulent Notice of Deficiency could be issued.

(5) At the end of the trial, Tax Court Judge Swift denied our motion dated 06/08/95 (CR 0068) to restrain the assessment or collection of taxes while the case was before the Tax Court and no final decision had been filed, in violation of 26 U.S.C.S. §6213. Tax case cited below.

26 U.S.C.S. §6213, n 71. . .C. Injunction to Enforce Stay 76. Generally

Normally, Internal Revenue Service may not asses tax or collect it, by levying on or otherwise seizing taxpayer's assets, until taxpayer has had opportunity to exhaust administrative remedies, which include opportunity to litigate tax liability fully in Tax Court; if Internal Revenue Service does attempt to collect tax by levy or otherwise, before such exhaustion of remedies in violation of 26 U.S.C.S. §6213, collection is not protected by Anti-Injunction Act and may be restrained by District Court, but rule is otherwise when Commissioner proceeds under 26 U.S.C.S. §6861 and finds that collection will be jeopardized by delay in collection. Commissioner v Shapiro (1976) 424 U.S. 614, 47 L Ed 2d 278,

96 S Ct 1062, 76-1 U.S.T.C. II 9266, 37 AFTR 2d 76-959.

Taxpayer who set forth plausible and believable ground to show that IRS levy relates to tax year for which petition is pending before tax court may petition tax court for injunction; burden of proof is placed on IRS that its assessments are not subject of pending tax court proceeding. Kamholz v Commissioner (1990) 94 TC No. 2.

26 U.S. C.S. §7481, n 14 . . .12. Collection of taxes pending final decision

Where decision of Tax Court with respect to years 1942-1944 was reversed by Court of Appeals and case remanded for further proceedings, with right in parties to introduce additional evidence, decision of Tax Court was not final and taxpayers were entitled to preliminary injunction against attempts to collect taxes for those years under purported assessments and liens. Gunn v Mathis (1957, WD Ark) 157 F Supp 169, 58-1 USTC II 9136, 58-1 USTC II 9201, 1 AFTR 2d 308, 1 AFTR 2d 560.

(6) Interest Tasked By Tax Court's Excessive Delay Of The Case. The question of whether the United States Tax Court should be required to eliminate/reduce the interest charged by the Internal Revenue Service against the deficiencies cited in the Court's decision. The excessive interest was incurred because of the over 3 1/2 years delay of the case by Special Trial Judge Powell. This is a matter of justice that could have been corrected by the Tax Court and certainly by the Court of Appeals. Petitioners submitted their

motions for the delection of interest for the over 3 1/2 years; filed 02/29/96 (CR 0075). The motion was denied by Tax Court Judge Swift on 03/13/96 at the end of the trial (CR 0079 at 81.)

The over 3 1/2 year delay was not due to the Petitioners in any way. They had petitioned the Court for a redetermination of the IRS notice of deficiency issued against them. They had followed all the Tax Court Judges' orders.

Tax Court Judge Swift could have granted the motion, but stated he had "no authority." "I have very limited authority on remand. . ." (CR 0079 at 81.)

Tax Case Law concerning this issue was cited to the Tax Court and the Court of Appeals, to no avail.

> Change or correction. Tax Court may change its original findings of fact provided alteration has substantial evidentiary basis. Tehan v Commissioner (1961, CA7) 295 F2d 895, 61-2 USTC II 9736, 8 AFTR 2d 5723.

(7) Validity of the Notice of Deficiency. The most important question presented for review and that affects all petitioners to the United States Tax Court, is the validity of the Notice of Deficiency. The United States Tax Court will not allow any recomputation of the deficiencies to ensure they are correct; not inflated; and that proper credit has been given for taxes already paid in prior to the Notice of Deficiency being issued and the additions to tax actually apply to the taxpayers.

Petitioners made an oral motion to the Tax Court at the end of the trial held by Tax Court Judge Swift on 03/13/1996 (CR 0079 at 82) to have a

recomputation of deficiencies. Judge Swift denied the motion.

> Vacation and correction. Tax Court has power, in its descretion, in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to jurisdiction of court to grant writ of error coram nobis. Reo Motors, Inc. v Commissioner (1955, CA6) 219 F2d 610, 55-1 USTC II 49090, 46 AFTR 1740.

The Court of Appeals for the Ninth Circuit had the authority to review the above denied motions to prevent injustice, but refused to do so.

> 44. Review to prevent injustice. Court of Appeals could, where injustice might otherwise have resulted, pass upon questions outside of those which were directly and squarely presented in proceedings before Board of Tax Appeals [now Tax Court] Hormel v. Helvering (1941) 312 US 552, 85 L Ed 1037, 61 S Ct 719, 41-1 USTC ¶9322, 25 AFTR 1198; Helvering v. Richter (1941) 312 US 561, 85 L Ed 1043, 61 S Ct 723, 41-1 USTC ¶9323, 25 AFTR 1202; Commissioner v. Linderman (1934, CA3) 84 F2d 727, 36-2 USTC ¶ 9428, 18 AFTR 199, cert den 299 US 589, 81 L Ed 434, 57 S Ct 116; Commissioner v. Goulder (1941, CA6) 123 F2d 686, 41-2 USTÇ ¶9777, 28 AFTR 392; Commissioner v.

> Montague (1942, CA6) 126 F2d 948, 42-1 USTC ¶10162, 29 AFTR 47. If Court of Appeals was of opinion that decision of Board of Tax Appeals [now Tax Court] was not in accordance with law, there was no reason why it could not reverse decision of Board as justice required, even on point not raised before Board. Legg's Estate v. Commissioner (1940, CA4) 114 F2d 760, 40-2 USTC ¶9683, 25 AFTR 717.

The Court of Appeals stated on November 7, 1997 That the above cited contentions, "are wholly without merit."

When the United States Tax Court accepts the Internal Revenue Service notice of deficiency as true and correct without allowing any recomputation, the IRS then knows it can falsify the notices of deficiency without any fear of accountability.

Petitioners believe the provisions of the new tax bill (passed by Congress on 07/22/98) under Title III, Taxpayers Protection and Rights, "placing the burden of proof in any Court proceeding with respect to any factual issue relevant to ascertaining the income tax liability of a taxpayer on the Secretary. . ."; applies to this instant case. That the Commissioner of Internal Revenue Service must now prove that Taxpayers owed any tax for the three years 1982, 1983 or 1984.

CONCLUSION

The Petition for Writ of Certiorari should be granted as the Questions presented have a direct application to thousands of taxpayers who petition the Tax Court every year.

Respectfully submitted,

GARY A. BYBEE
Post Office Box 789
Afton, Wyoming 83110
(307) 886-9322

FRANCES BYBEE
Post Office Box 789
Afton, Wyoming 83110
(307) 886-9322

Pro Se

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

GARY A BYBEE; FRANCES BYBEE,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

ORDER. Before: HUG, Chief Judge,
PREGERSON AND BEEZER, Circuit Judges.

Nos. 97-70145, 97-70442.

Tax Ct. No. 43665-86

FILED JUL 30, 1998

The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

GARY A BYBEE; FRANCES BYBEE,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

MEMORDANDUM* APEAL FROM THE UNITED STATES TAX COURT

Nos. 97-70145, 97-70442

Tax Ct. No. 43665-86

FILED NOV 7, 1997

APPEAL FROM THE UNITED STATES TAX COURT SUBMITTED NOVEMBER 4, 1997

Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

Gary and Frances Bybee appeal pro se a tax court decision concluding that a notice of deficiency for tax your 1982 was timely issued. We have jurisdiction pursuant to 26 U.S.C. § 7482. We review the tax court's legal conclusions de novo and its factual findings for clear error. See Condor Int'l, Inc. v. Commissioner, 78 F. 3d 1355, 1358 (9th Cir. 1996). We affirm.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The taxpayers contend that the tax court erred by determining that the notice of deficiency for tax year 1982 was timely issued. We disagree. The taxpayers filed their 1982 joint federal income tax return on April 15, 1983. The Commissioner issued the notice of deficiency on September 9, 1986. Although 26 U.S.C. § 6501 (a) provides that a deficiency must generally be assessed within three years from the date the taxpayer files his or her federal income tax return, the record contain a Form 872-Consent to Extend the Time to Assess Tax, signed by the taxpayers on December 12, 1985, which extended the time for assessment to December 31, 1986. See 26 U.S. C. § 6501 (c) (4) (stating that a taxpayer may consent in writing to the extension of the three-year period for the assessment of tax). Accordingly, the notice of deficiency was timely.

The tax court properly rejected the taxpayers' contention that some from the Internal Revenue Service forged their signatures on the Form 872, noting that the signatures on the Form 872 matched the signatures on the taypayers' tax returns and that no credible evidence was offered to the contrary.

To the extent the taxpayers seek review of their tax deficiencies and additions to tax, these issues were disposed of in Bybee v. Commissioner, No. 93-70942, unpublished memorandum disposition (9th Cir. July 26, 1997), which is law of the case. See Leslie Salt Co. v United States, 55 F. 3d 1388, 1392 (9th Cir. 1995) ("Under law of the case doctrine. . .one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case."). The taxpayers' remaining contentions are wholly without merit.

AFFIRMED.

UNITED STATES TAX COURT

GARY A BYBEE and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Tax Ct. No. 43665-86

ENTERED: SEP 17, 1996

DECISION

Pursuant to the determination of the U.S. Court of Appeals for the Ninth Circuit, which determination affd. in part, vacated and remanded in part his Court's Opinion, T.C. Memo. 1993-232, filed May 25, 1993, and pursuant to the determination of this Court as set forth in its Supplemental Memorandum Opinion, T.C. Memo. 1996-411, filed September 12, 1996, it is

ORDERED AND DECIDED that there are deficiencies and additions to tax due from petitioners for in the follow amounts:

		Additions to Tax		
Year	Deficiency	Sec. 6653 (a)(1)	Sec. 6653 (a)(2)	Sec. 6661
1982	$11,047	$552	*	$1,105
1983	$13,503	$675	*	$1,350
1984	$11,957	$598	*	$1,196

* 50 percent of interest due on portion of underpayment attributable to negligence.

"s/Stephen J. Swift, Judge"

UNITED STATES TAX COURT

GARY A BYBEE and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

Tax Ct. No. 43665-86

ENTERED: SEP 16, 1996

ORDER

In accordance with the Mandate issued on December 29, 1994, by the U.S. Court of Appeals for the Ninth Circuit which affirmed in part, vacated and remanded in part this Court's Opinion, T.C. Memo. 1993-232, filed May 25, 1993, it is

ORDERED that the Decision entered May 25, 1993, is hereby vacated and set aside.

"s/Stephen J. Swift, Judge"

UNITED STATES TAX COURT

GARY A and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.*

T.C. Memo. 1996-411. SUPPLEMENTAL MEMORANDUM FINDINGS OF FACT AND OPINION.

Tax Ct. No. 43665-86

FILED SEP 12, 1996

SUPPLEMENTAL MEMORANDUM FINDINGS OF FACT AND OPINION

SWIFT, Judge: This matter is before the Court on remand from the Court of Appeals for the Ninth Circuit in Bybee v. Commissioner, 29 F. 3d 630 (9th Cir. 1994), affg. in part, vacating and remanding in part without published opinion T.C. Memo. 1993-232.

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for 1982, and all Rule references are to the Tax Court Rules of Practice and Procedure. All references to petitioner, singular, are to Gary A. Bybee.

In Bybee v. Commissioner, T.C. Memo. 1993-232, was sustained respondent's Federal income tax deficiency

---

* This opinion supplements Bybee v. Commissioner, T.C. Memo. 1993-232.

determinations and additions to tax for 1982, 1983, and 1984, as reflected in the schedule below:

		Additions to Tax		
Year	Deficiency	Sec. 6653 (a)(1)	Sec. 6653 (a)(2)	Sec. 6661
1982	$11,047	$552	*	$1,105
1983	$13,503	$675	*	$1,350
1984	$11,957	$598	*	$1,196

* 50 percent of interest due on portion of underpayment attributable to negligence.

In Bybee v. Commissioner, supra, the Court of Appeals for the Ninth Circuit affirmed our decision relating to petitioners' 1983 and 1984 Federal income tax deficiencies and additions to tax. With regard, however, to our decision relating to petitioners' 1982 Federal income tax deficiency and additions to tax, the Court of Appeals for the Ninth Circuit questioned whether respondent's notice of deficiency was timely mailed pursuant to section 6501 (a) and remanded that question to us for our consideration.

FINDINGS OF FACT

On April 15, 1983, petitioners filed their 1982 joint Federal income tax return.

In December of 1984, respondent began an audit of petitioners' 1983 joint Federal income tax return.

In 1985, respondent expanded the audit to include petitioners' 1982 and 1984 joint Federal income tax returns. Petitioner refused to provide to respondent's revenue agent any records relating to 1982 or 1984.

On September 26 and 27, 1985, respondent's revenue agent requested of petitioner and extension of the period of

limitation on assessment of tax for 1982, which period was due to expire on April 15, 1986.

On November 19, 1985, petitioner met with respondent's revenue agent and with the revenue agent's group manager to discuss the audit generally and the requested extension of the period of limitation for 1982. During the meeting, the revenue agent prepared a Form 872, Consent to Extend the Time to Assess Tax, which regard to petitioners' joint Federal income tax for 1982, reflecting a limitation date of December 31, 1986. Respondent's revenue agent provided this form to petitioner with a request to sign the form and to return it to respondent by December 20, 1985.

On December 17, 1985, respondent received, via certified mail, the above Form 872 signed by petitioners and dated December 12, 1985. One December 30, 1985, respondent's authorized representative signed this Form 872.

On September 9, 1986, more than 3 months before the December 31, 1986, expiration date, respondent mailed the notice of deficiency with regard to petitioners' 1982 Federal income tax.

OPINION

Section 6501 (a) provides the general 3-year period of limitations applicable to respondent's authority to assess Federal income taxes. Under section 6501 (c) (4), before the 3-year period of limitations has expired, respondent's representatives and a taxpayer may consent in writing to the assessment of tax after the expiration of the 3-year period. The tax may then be assessed at any time before the new expiration date.

Petitioners and respondent's representative signed the Form 872 on December 12, 1985, agreeing to extend the period of limitation applicable to petitioners' 1982 Federal income tax to December 31, 1986. Sec. 6501 (c) (4).

Petitioners allege that they did not personally sign the

Form 872 and that someone in respondent's office forged their signatures.

Petitioners herein have completely failed to satisfy their burden to prove that the signatures on the Form 872 constitute forgeries. Rule 142 (a).

The handwriting reflected by petitioners' signatures on their 1982, 1983, and 1984 joint Federal income tax returns appears to be identical to the handwriting reflected by petitioners' signatures on the Form 872, and no credible evidence indicates to the contrary.

In this case, the evidence is clear that the period of limitation to assess tax for 1982 was properly extended to December 31, 1986, and that respondent, on September 9, 1986, timely mailed the notice of deficiency regarding petitioners' 1982 Federal income tax.

In accordance with our prior decision and the decision of the Court of Appeals for the Ninth Circuit, we conclude that respondent's notice of deficiency for 1982 was issued within the prescribed statutory period and that petitioners are liable for the Federal income tax deficiency and additions to tax for 1982 as previously determined by this Court in Bybee v. Commissioner, supra.

Decision will be entered
for respondent.

UNITED STATES TAX COURT

GARY A and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

Tax Ct. No. 43665-86

DATED: NOVEMBER 29, 1995

ORDER

On December 29, 1994, the U.S. Court of Appeals for the Ninth Circuit issued a mandate in which it affirmed in part the decision of the U.S. Tax Court in the above case and vacated and remanded in part with regard to a statute of limitations issue. For cause, it is

ORDERED that this case is calendared for an evidentiary hearing pursuant to the remand by the Ninth Circuit to consider whether the Commissioner issued the notice of deficiency for tax year 1982 within the prescribed statutory period, during the Court's March 13, 1996, Salt Lake City Special Trial Session at a time and date certain of 2:00 p.m. on March 13, 1996, in Room 250, American Towers, 46 West 300 South, Salt Lake City, Utah.

This Order constitutes official notice of its contents to the parties involved.

"s/Stephen J. Swift, Judge"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY A BYBEE; FRANCES BYBEE,
Petitioners-Appellants.

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent-Appellee.

MEMORANDUM*. Appeal from the United States Tax Court

SUBMITTED: July 18, 1994

Before: FARRIS, KOZINSKI, and NOONAN, Circuit Judges

No. 43665-86

FILED JUL 26, 1994

Appeal from the United States Tax Court

Submitted July 18, 1994**

Before: FARRIS, KOZINKSI, and NOONAN, Circuit Judges

Gary and Frances Bybee appeal pro se the tax court's decision upholding the Commissioner of Internal Revenue Service's ("IRS") (1) determination of federal income tax

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this curcuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a); 9th Cir. R. 34-4.

deficiencies for the tax years 1982 through 1984, and (2) imposition of additions to tax for negligence and substantial underpayment of income tax. We have jurisdiction under 26 U.S.C. § 7482 (a) (1), and we affirm in part and vacate and remand in part.

I

Determination of Deficiencies

A. Statue of Limitations: Tax Year 1982

The Bybees contend that the notice of deficiencies was issued fraudulently. It appears from the record, that the notice of deficiency for tax year 1982 may not have been issued within the three-year statute of limitations period contained in 26 U.S.C. § 6501 (a).

Generally, taxes must be assessed within three years from the date a return is "filed". See 26 U.S.C. § 6501 (a); Edwards v. Commissioner, 680 F. 2d 1268, 1269 (9th Cir. 1982). Here, neither the Commissioner, nor the tax court addressed the issue of whether the notice of deficiency was issued in a timely fashion. Accordingly, we vacate and remand for the tax court to consider, in the first instance, whether the Commissioner issued the notice of deficiency for tax year 1982 within the prescribed statutory period.[1/]

[1/] To the extent that the Bybee's allege that the notice of deficiency was fraudulent because the Commissioner had failed to conduct audits of tax years 1982 and 1984 and therefore had failed to make actual determinations of their deficiencies prior to issuing the deficiency notice, their contention lacks merit. As a general rule, we will not "look behind a deficiency notice to question the Commissioner's motives and procedures leading to a determinations " of a taxpayer's liability. See Scar V. Commissioner, 814 F. 2d 1363, 1368-70 (9th Cir. 1987); Kantor v. Commissioner, 998 F. 2d 1514, 1521 (9th Cir. 1993) (Rejecting taxypayers' contention that notice of deficiency was invalid because deficiencies are valid on their face; the disallowances by the Commissioner coincided with the deductions claimed on the Bybees' returns. Thus, the deficiencies indicate that the Commissioner had examined the returns. See Kantor, 998 F. 2d at 1522.

B. Expense Deductions: Tax Years 1982 through 1984.

The Bybees contend that the tax court erred by finding that the expenses they incurred in the development of a toxic waste disposal business were not deductible because they were start-up expenses rather than expenses incurred in carrying on a trade or business. This contention lack merit.

The Bybees had the burden of presenting evidence providing the Commissioner's assessment incorrect and proving that they were entitled to claim the expense deductions. Smith v. Commissioner, 800 F. 2nd 930, 933 (9th Cir. 1986). We review the tax court's determination that the Bybees failed to meet their burden for clear error. See id.

Under section 162 (a) of the Internal Revenue Code ("Code") a taypayer may deduct "ordinary and necessary expenses. . . incurred during the taxable year in carrying on any trade or business." 26 U.S.C. § 162 (a). "An expense is generally not deductible under section 162 unless the taxpayer is engaged in an ongoing business at the time the expense is incurred." Kantor v. Commissioner, 998 F. 2d 1514, 1518 (9th Cir. 1993). Consequently, "a nascent business may not deduct its 'start-up' or 'pre-operational' expenses under section 162 and must instead capitalize them." Id.

Here, the Bybees' tax returns for tax years 1982 and 1983 described Gary Bybee's main business activity as "land developer" and the product as a "toxic waster storage site." The return listed $29,314 and $34,669 respectively, in expenses yet reported no gross receipts or sales and claimed no cost of goods sold. The Bybees' tax return for 1984 identified Gary Bybee's main business activity as "research and consulting" and the product as "security". The return showed $166.67 in gross receipts and sought a deduction for $33,065.

At trial, Gary Bybee testified that the purpose of his business was to find ways to prevent low-level nuclear and toxic waste from entering the food and water chain. He was forced, however, to abandon his efforts because of illness and financial difficulties. During the tax years at issue, Bybee failed to make any income from his activities, complete an actual product, enter into any contracts, or obtain permits for the construction of a waster disposal site. He also testified that he knew that it would take years for his efforts and research to come to fruition. Although Bybee testified that he had worked with a team of professionals, including several nuclear scientists, he refused to identify any members of this team, and admitted that the only persons he ever actually hired were his three sons. Thus, his deductions for "legal-professional services" and "travel and entertainment" represented his sons' "legal-work" on his behalf. This work included research at the universities they attended and obtaining and reading periodicals. Bybee stated that rather than paying his sons a salary, he covered their school and living expenses. Accordingly, at least some of the claimed office expenses consisted of the rent paid on his son's college apartments.

The tax court found that Bybee failed to submit sufficient evidence to establish that he was engaged in an ongoing trade or business. Thus, the court found that Bybee's investigation of business possibilities, prospects, and potential customers did not constitute carrying on a trade or business as defined under section 162. We agree. See Kantor, 998 F. 2d at 1518.

Bybee's alleged business expenses also were no deductible pursuant to section 174 of the Code. Section 174 (a)(1) permits a taxpayer to deduct "research or experimental expenditures which are paid or incurred by him during the taxable year in connection with his trade or business." 26 U.S.C. § 174 (a) (1); Kantor, 998 F. 2d at 1518. For section 174 to apply, however, "the taxpayer must demonstrate a

'realistic prospect' of subsequently entering its own business in connection with the fruits of the research, assuming that the research is successful." Kantor, 998 F. 2d at 1518. Thus, the taxpayer must manifest "both the objective intent to enter such a business and the capability of doing so." Id. Here, the Bybees failed to present any evidence demonstrating that they had the financial or organizational capability to establish a waste disposal business. Accordingly, because there was no "realistic prospect" of the Bybees entering a waste disposal business as a result of their research efforts, they were not entitled to claim the deductions pursuant to section 174 (a) (1). Given these circumstances, the tax court did not clearly err by sustaining the Commissioner's deficiency determination for tax years 1982 through 1984. See Smith, 800 F. 2d at 933.

II

Additions to Tax

The Bybees contend that the tax court erred by upholding the IRS's assessments of additions to tax for negligence under 26 U.S.C. § 6653 (a) and for substantial understatement income tax under 26 U.S.C. § 6661. This court reviews the tax court's decision upholding these additions to tax for clear error. Norgaard v. Commissioner, 939 R. 2d 874, 877 (9th Cir. 1991).

A. Negligence

Negligence under section 6653 (a) is defined as "the lack of due care or the failure to do what a reasonable and prudent person would do under similar circumstances." Allen v. Commissioner, 925 F. 2d 348, 353 (9th Cir. 1991). Section 6653 (a) (1) imposes a five percent addition to tax against a taxpayer when any part of an underpayment is due to negligence. Id. Prior to 1988, section 6653 (a) (1) also imposed a penalty of fifty percent of the interest due on the underpayment. Id. Because the IRS's assessment of a section 6653 (a)

addition to tax is presumed correct, the Bybees had the burden of proving that the underpayment was not the result of negligence. See id.

At the trial, the Bybees testified that they relied on the IRS publication "Tax Guide for Small Businesses" to claim their deductions. As the tax court noted, however, this publication explicitly states that start-up costs such as travel expenses and research expenditures are not deductible but rather need to be capitalized. The tax court also correctly noted that many of the Bybees' alleged b business expenses appeared to be personal in nature, and that the Bybees had failed to seek outside advice on the tax implications of their business activities. Given these circumstances, the tax court did not clearly err by imposing the negligence penalty. See id.

B. Substantial Understatement

At the time the Bybees filed the returns at issue, section 6661 provided for an addition to tax equal to twenty-five percent of the amount of any underpayment attributable to a substantial understatement. See former 26 U.S. C. § 6661 (a). [2] An understatement was substantial if it exceeded the greater of ten percent of the tax required to be shown on the return or $5,000. See id. § 6661 (b) (1) (A). Where a taxpayer had "reasonable cause" or substantial authority to support the understatement and acted in good faith, the IRS had discretion to waive the penalty. See id. § 6661 (c); Norgaard, 939 F. 2d at 880.

Here, the IRS determined that the Bybees were liable under section 6661 for a substantial understatement of tax for tax years 1982 through 1984. Because the Bybees understated their tax by more than ten percent for these tax years,

---

[2] Section 6661 was repealed in 1989. See Licari v. Commissioner, 946 F. 2d 690, 692 n. 3 (9th Cir. 1991).

the amounts assessed were correct. See former 26 U.S.C. § 6661 (b) (1) (A). The Bybees presented no evidence showing they had reasonable cause for the understatement or substantial authority for their position. See id. § 6661 (c); Norgaard, 939 F. 2d at 880. Thus, the tax court did nor err by upholding the IRS's addition to tax for substantial understatement. See Norgaard, 939 F. 2d at 880-81.[3]

AFFIRMED in part, VACATED and REMANDED in part.[4]

---

[3] We reject the Bybees' contention that the tax court is not a legal court. See Redhouse v. Commissioner, 728 F. 2d 1249, 1253 n.2 (9th Cir.), cert. denied, 469 U.S. 1034 (1984). Moreover, to the extent that the Bybees allege civil rights violations arising from the IRS's actions, the tax court was without jurisdiction to consider the claims. See Commissioner v. McCoy, 484 U.S. 3, 6 (1987) (tax court is a court of limited jurisdiction).

[4] We deny the Bybees' motions to stay the order of the tax court pending the disposition of their appeal.

UNITED STATES TAX COURT

GARY A and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

No. 43665-86

ENTERED: MAY 25, 1993

DECISION

Pursuant to the determination of the Court as set forth in T.C. Memo 1993-232, filed May 25, 1993, it is

ORDERED AND DECIDED that there are deficiences in and additions to petitioners' Federal income taxes as follows:

		Additions to Tax		
Year	Deficiency	Sec. 6653 (a)(1)	Sec. 6653 (a)(2)	Sec. 6661
1982	$11,047	$552	1	$1,105
1983	$13,503	$675	1	$1,350
1984	$11,957	$598	1	$1,196

[1] Amount to be determined

"s/Charles E. Clapp II, Judge"

UNITED STATES TAX COURT

GARY A and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

T.C. Memo. 1993-232.
MEMORANDUM FINDINGS OF FACT AND OPINION

No. 43665-86

Filed: May 25, 1993
SERVED: MAY 25, 1993

MEMORANDUM FINDINGS OF FACT AND OPINION

CLAPP, Judge: Respondent determined the following deficiencies in and additions to petitioners' Federal income taxes:

		Additions to Tax		
Year	Deficiency	Sec. 6653 (a)(1)	Sec. 6653 (a)(2)	Sec. 6661
1982	$11,047	$552	1	$1,105
1983	$13,503	$675	1	$1,350
1984	$11,957	$598	1	$1,196

[1] Amount to be determined.

The issue for decision are:

(1) Whether petitioner Gary A. Bybee's efforts during 1982, 1983, and 1984 to develop procedures and products for toxic and low-level nuclear waste disposal constituted the carrying on of a trade or business within the meaning of section 162, so that petitioners are entitled to deductions under that section for expenses in connection with such activities during those years, and if so, in what amounts. We hold that no such trade or business commenced during 1982, 1983, or 1984, and consequently expenditures made in the effort to develop the trade or business were, at most, start-up costs which were not deductible during the years in issue.

(2) Whether petitioners are liable for the additions to tax for negligence under section 6653 (a) (1) and (2). We hold that they are.

(3) Whether petitioners are liable for the additions to tax for substantial understatements of liabilities under section 6661. We hold that they are.

All section references are to the Internal Revenue Code in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

FINDINGS OF FACT

We incorporate by reference the stipulation of facts and attached exhibits. Petitioners listed their address as P.O. Box 1989, Lakeside, Arizona, on the petition they filed on November 10, 1986, invoking the jurisdiction of this Court. References to petitioner in the singular are to petitioner Gary A. Bybee.

Petitioner desired to enter into business regarding the disposal of toxic and low-level nuclear waste. To this end, during the years at issue petitioner obtained and read various Government and other publications addressing such topics,

contacted "professional representing various fields of expertise", identified testing laboratories an possible customer, and surveyed possible sites. After failing to complete development of a toxic and low-level nuclear waste-disposal process or product, or to obtain customers, petitioner "let it die at that point."

Each of petitioners' Federal income tax returns for the years at issue included a Schedule C. The Schedules C for 1982 and 1983 listed petitioner's main business activity as "land developer" and the product as "toxic waste storage site". For 1984 the Schedule C listed petitioner's main business activity as "research and consultant" and the product as "security". Petitioner was the named proprietor on the Schedule C for each of the 3 years at issue.

The Schedule C for 1982 and 1983 listed $29, 314 and $34,669.44, respectively, in expenses, yet reported no gross receipts or sales and claimed no cost of goods sold. Petitioner's 1984 Schedule C showed $166.67 of gross receipts or sales, $7,630 in cost of goods sold, and $25,602 in expenses. Thus, petitioners deducted business losses of $29,314, $34,669.44, and $33,065.33 for 1982, 1983 and 1984, respectively, in arriving at their adjusted gross income for each of these years.

Of the expenses and costs of goods sold listed on the Schedules C, $7,185, $15,153, and $14,591 for 1982, 1983, and 1984, respectively, were direct payments to petitioners' children. These payment were deducted on the Schedules C variously as legal and professional expense, rent expense, office expense, supplies expense, employee benefits expense, and cost of goods sold. All of the checks written to petitioners' children were made payable either to one of the three children or to cash, and none of the checks had any notation regarding its purported business purpose or otherwise. During those years, petitioners' children were attending

colleges at which research regarding disposal of toxic and low-level nuclear waste was conducted. At least some of the payments allocated to rent and other purported business expenses were used to pay the rent for an apartment which housed petitioners' children while they were attending college as well as for other college-related expenses.

Petitioner's "business" efforts were restricted to researching the various designs, methods, and systems of toxic and low-level nuclear waste disposal, determining the feasibility of such, and locating possible customers and sites for such an activity.

OPINION

The primary issue in this case is whether petitioner's research and related activities during the years at issue rise to the level of carrying on a trade or business within the meaning of section 162, or are start-up expenditures within the meaning of section 195, or are otherwise nondeductible personal expenditures.

Deductions are a matter of legislative grace, and "only as there is clear provision therefore can any particular deduction be allowed." Deputy v. De Pont, 308 U.S. 488, 493 (1940) (quoting New Colonial Ice Co. V. Helvering, 292 U.S. 435, 440 (1934)). Section 162 allows a deduction for "Trade or Business Expenses" which are "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business". Sec. 162 (a). (Emphasis added.) Start-up expenses, however, are not deductible, although the taxpayer may elect to amortize such expenditures over a period of not less than 60 months. Sec. 195 (a). Start-up expenditures are defined, inter alia, as any amount "paid or incurred in connection with -- (A) investigating the creation or acquisition of an active trade or business, or (B) creating an active trade or business." Sec. 195 (b) (1).

Petitioner claims that he "was in the business of research and development of methods and procedures to safely transport and dispose toxic and low-level nuclear wastes" during the years at issue. In support of his claim, petitioner asserts that in addition to basic fact-gathering research, he "established an on-call working group of Professionals in selected fields of expertise to assist" in petitioner's business, identified and contacted potential customers, and surveyed potential disposal sites. Respondent contends, however, that petitioner's expenditure have not been substantiated fully, and that at least some portions of the expenditures were personal in nature and were not related to a trade or business. Respondent further argues that, in any case, petitioner was not entitled to any of the claimed deductions because he was not engaged in the active conduct of a trade or business during the years at issue.

The question of whether a taxpayer is engaged in the active conduct of a trade or business requires an examination of all of the relevant facts. Commissioner v. Groetzinger, 480 U. S. 23, 36 (1987). It is well settled that in order to be deductible under section 162, "expenses must relate to a trade or business functioning at the time the expenses are incurred." Hardy v. Commissioner, 93 T.C. 684, 687 (1989), affd. on this point in an unpublished order of the Court of Appeals for Tenth Circuit filed October 29, 1990. In order to be currently deductible, the expenses must have been incurred after the taxpayer's trade or business actually commenced; expenses incurred prior to such time are nondeductible pre-opening expenses. Jackson v. Commissioner, 864 F. 2d 1521 (10th Cir. 1989), affg. 86 T.C. 492 (1986); Goodwin v. Commissioner, 75 T.C. 424, 433 (1980), affd. without published opinion 691 F. 2d 490 (3d Cir. 1982); McManus V. Commissioner, T.C. Memo. 1987-457 effd. without published opinion 865 F. 2d 355 (4th Cir. 1988). In articulating this "pre-opening expenses doctrine", it has been said:

> even though a taxpayer has made a firm decision to enter into business and over a considerable period of time spent money in preparation for entering that business, he still has not "engaged in carrying on any trade or business" within the intendment of section 162 (a) until such time as the business has begun to function as a going concern and performed those activities for which it was organized. [Richmond Television Corp. v. United States, 345 F. 2d 901, 907 (4th Cir. 1965), vacated and remanded on other grounds 382 U.S. 68 (1965), original holding on this issue reaffd. 354 F. 2d 410, 411 (4th Cir. 1965); fn. ref. omitted; emphasis added.]

Thus, "carrying on any trade or business" required a showing of more than initial research into business potential and solicitation of potential customers or clients. Dean V. Commissioner, 56 T.C. 895, 902 (1971); Pino v. Commissioner, T.C. Memo. 1987-28; Goldman v. Commissioner, T.C. Memo. 1975-138. "Carrying on any trade or business" also requires more than identifying, contacting and agreeing with potential partners, contractors, or other business personnel. Richmond Television Corp. v. United States, supra at 907. The activities must be currently engaged in for profit. Industrial Research Products, Inc. v. Commissioner, 40 T.C. 578, 590 (1963).

Petitioner has failed to submit any evidence that he was carrying on any trade or business during the years at issue. Petitioner claimed to have a working group of professionals ready to assist his business efforts, but refused to identify them and failed to show what, if anything, they did for or with petitioner in the active conduct of any trade or business. There is no evidence that petitioner ever obtained permits to engage in waster disposal or ever agreed with anyone to perform any such services or to provide a product of any

kind during the years at issue. The nature and source of petitioner's only reported gross receipts during the years at issue from these activities, $166.67 in 1984, was unsubstantiated and unexplained.

Petitioner has shown, at most, that he incurred some start-up costs to develop a trade or b business in the area of toxic and low-level nuclear waste disposal. Petitioner submitted no evidence that any such trade or business ever commenced, and admitted that he eventually abandoned his efforts, although there is no evidence as to when such abandonment occurred. Merely investigating business possibilities, , prospects, and potential customers does not constitute carrying on a trade or business. See Richmond Television Corp. v. United States, supra.; Dean v. Commissioner, supra. Moreover, it appears that at least part of petitioner's purported business expenses (e.g., part of the payments made to petitioners' children) were actually nondeductible personal expenses.

We hold that petitioners have failed to establish that any of their claimed business expenses were incurred in connection with the carrying on of a trade or business within the meaning of section 162. Thus, they are not entitled to deductions for the same for the years at issue, and we sustain respondent's deficiency determinations.

Respondent also determined that petitioners are liable for the additions to tax for negligency under section 6653 (a) (1) and (2). Negligence under section 6653 (a) is a "lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances." Neely v. Commissioner, 85 T.C. 934, 947 (1985) (quoted Marcello v. Commissioner, 380 F. 2d 499, 506 (5th Cir. 1957)).

Petitioners' only argument regarding the additions to tax for negligence under section 6653 (a) (1) and (2) is their r reliance on respondent's Publication 334, Tax Guide for

Small Business. Petitioners claim that the discussion on pages 14-18 of the version of this publication for tax year 1984 justifies their return position. We disagree. The discussion i Publication 334, to which petitioners point, refers to the election to capitalize or deduct research and experimental costs incurred in a business. However, immediately preceding that discussion is a section on the same page titled "Establishing Yourself in Business." The discussion in this latter section lists the most common start-up costs incurred b y taxpayers contemplating starting a business, including "travel [expenses] to look over various business possibilities, or to find customers and suppliers", and expenses incurred to "conduct market surveys". This section goes on to explain:

> However, because your business has not yet started active operations, you are not allowed to deduct these kinds of costs as expenses. The costs you have in setting up a business are capital expenditures. They cannot be taken either as business or as nonbusiness deductions.

We note that this section, and in particular the above-quoted language, is underscored in pen in the copy of the 1984 version of Publication 334 that petitioners submitted as evidence in this case. We also note that petitioners apparently failed to consult with an outside business consultant, lawyer, or accountant regarding beginning a business or the proper tax treatment of the costs incurred in anticipation of starting a business. We further note that at least part of the rent and other purported business expenses deducted were for nonbusiness purposes. On this record, we hold that petitioners failed to act reasonably and prudently in filing their Federal income tax returns for 1982, 1983, and 1984 and are liable for the additions to tax for negligence under section 6653 (a) (1) and (2) for those years as determined by respondent.

Respondent further determined that petitioners are liable for the additions to tax for substantial understatements of tax liabilities under section 6661. An understatement of tax is substantial if the amount of the understatement for the tax year is more than $5,000 or greater than 10 percent of the amount required to be shown on the return. Sec. 6661 (b) (1) (A) (i) and (ii). Based on our holding above regarding the deficiencies determined by respondent, petitioners' understatement of tax for each of the 3 years at issue are substantial. Thus, we hold hat petitioners are liable for the additions to tax for substantial understatements of liabilities under section 6661 for those years as determined by respondent.

Decision will be entered for respondent.

UNITED STATES TAX COURT

GARY A and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

No. 43665-86

Dated: Salt Lake City, Utah - March 10, 1992.

ORDER

This case was recalled from the calendar for the Trial Session of the Court at Salt Lake City, Utah on March 10, 1992. Both parties appeared and were heard. Petitioners orally moved the Court to continue this case generally. Upon due consideration, and for cause appearing in the transcript of the proceedings, it is

ORDERED that petitioners' oral motion to continue to hereby denied.

"s/Charles E. Clapp II, Judge"

UNITED STATES TAX COURT

GARY A BYBEE and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

No. 43665-86

Dated: Washington, D.C. - July 18, 1988

ORDER

For the reasons appearing in the transcript of hearing dated May 5, 1988, and the Joint Report to the Court, dated June 17, 1988 it is

ORDERED that respondent's Motion to Compel Production of Documents, filed January 5, 1988, is denied. It is further

ORDERED that petitioners are precluded from entering into evidence any documents not heretofore produced pursuant to respondent's Motion to Compel Production of Documents.

"s/Carleton D. Powell, Special Trial Judge"

UNITED STATES TAX COURT

GARY A BYBEE and FRANCES BYBEE,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER (To Petition Filed in U.S. Tax Court)

No. 43665-86

OF COUNSEL: January 07, 1987

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled case, admits, denies, and alleges as follows:

1. and 2. Admits.

3. Denies; alleges that in the statutory notice, upon which this case is based, respondent determined that the following deficiencies in income tax and additions to tax are due form petitioners for the following years, all of which are in dispute.

		Deficiencies		
Taxable	Income	Additions to the Tax IRC		
Year	Tax	§6653 (a)(1)	§6653 (a)(2)	§6661
1982	$11,047	$552	*	$1,105
1983	$13,503	$675	*	$1,350
1984	$11,957	$598	*	$1,196

* Fifty percent of interest due on the deficiency in income tax.

4. Admits that Mr. Seay of the Internal Revenue Service conducted an audit of petitioners' 1983 tax return on February 6, 1985. Admits a meeting was hold among petitioner. Mr. Seay, Mr. Renz, and Mr. Shepherd at Cheyenne, Wyoming, on November 19, 1985. Admits Form 5402 states that 8212 and 8412 years were not examined. Denies all additional allegations for lack of sufficient knowledge or information.

5. Denies generally each and every allegation of the petitioner not hereinbefore specifically admitted, qualified, or denies.

WHEREFORE, it is prayed that respondent's determination, as set forth in the statutory notice of deficiency, be in all respects approved.

WILLIAM F. NELSON
Chief Counsel
Internal Revenue Service

By: (Signed) William A. Goss
WILLIAM A. GOSS
District Counsel

JAN 07, 1987

OF COUNSEL:
DAVID L. JORDAN
Regional Counsel
1050-17th Street, 20th Floor
Denver, Colorado 80265
Tel. No. (303) 844-4358
(FTS) 564-4358

UNITED STATES TAX COURT

GARY A BYBEE and FRANCES BYBEE,
Petitioners.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION TO CORRECT/DELETE INTEREST
FOR THIRTY-SIX MONTHS.

Tax Ct. No. 43665-86

FILED NOV 1, 1996 • DENIED NOV. 6, 1996

THE PETITIONERS, in accordance with United States Tax Court Rules of Practice and Procedures, Rule 160. HARMLESS ERROR, make this motion to correct/delete the interest for a period of thirty-six months, imposed by Judge Swift's decision entered September 17, 1996.

The decision did not take into consideration the delay of the case, through no fault of the Petitioners, by Special Trial Judge Powell, when he retained the case for three years because of his involvement in another case which was before the United State Supreme Court.

On 03/09/88, Special Trial Judge Powell was assigned the Petitioners' case for the purpose of conducting the hearing on Respondent's motion to compel the production of documents filed 01/5/88 and Petitioners motion for protective order filed 02/01/88.

On 05/05/88 the hearing was held before Special Trial Judge Powell at Salt Lake City, Utah. Special Trial Judge Powell ordered the Petitioners to produce Schedule C records for tax years 1982, 1983 and 1984 for review by The Internal

Revenue Service in Salt Lake City, Utah even though 1982 and 1984 tax years had never been audited. A joint status report concerning the review of the document was ordered to be submitted to The Court by 06/01/88.

The joint report was filed by The Court on 06/17/88 according to Tax Court Item 20 record of Filings and Proceedings. See exhibit one.

The record also denotes on Item 0017, dated 05/05/88, that jurisdiction was retained by Special Trial Judge Powell.

Item 0021, dated 07/18/88 denotes Respondent's motion to compel production of documents filed January 5, 1988 was denied by Special Trial Judge Powell's order of July 18, 1988 which states:

ORDER

For the reasons appearing in the transcript of hearing dated May 5, 1988, and the Joint Report to the Court, dated June 17, 1988, it is

ORDERED that respondent's Motion to Compel Production of Documents, filed January 5, 1988, is denied. It is further

ORDERED that petitioners are precluded from entering into evidence any documents not heretofore produced pursuant to respondent's Motion to Compel Production of Documents.

The Petitioners received no further communications concerning the case until Special Trial Judge Powell's order dated 08/09/91 stating jurisdiction of case no longer retained; case restored to general docket. Petitioners had called The Tax Court Docket Section almost every month for three years to determine if the case was set for trial, which it had not.

During the hearing on 05/05/88 in Salt Lake City, Utah, Special Trial Judge Powell stated, as recorded on page 7 of

the hearing transcript, I am trying to get this case ready for trial. Petitioners complied with the Court Order to produce the Schedule C receipts and records for the three years cited; 1982, 1983 and 1984 as evidenced by the joint report filed by the Court on 06/17/88. Special Trial Judge Powell's order of 07/18/88 denying the Respondents' motion for the production of documents is further evidence that his participation in the case had ended. The case was ready for trial but he prevented it from going to trial for some three and one-half years; on May 10, 1992.

United States Tax Court Rules of Practice and Procedure, Rule 183, Cases involving more than $10,000.00; both the amendments effective as of July 1, 1990 and the previous amendment effective as of January 16, 1984; states: (b) Special Trial Judge's Report: After all the briefs have been filed by all parties (which in this case was the joining report) the Special Trial Judge shall submit a report, including findings of Fact and Opinion, to The Chief Judge, and the Chief Judge will assign the case to a Judge or Division of The Court.

Petitioners must assume that Special Trial Judge Powell retained the case for some 36 months after his order denying the Respondent's motion for the production of documents on 07/18/88 to when he returned it to general docket on 08/09/91; was because he was cited in FREYTAG vs COMMISSIONER, which was decided by The U.S. Supreme Court 27 June 1992.

Special Trail Judge Powell had not requested any further information from the Petitioners after the hearing of 05/05/88. There was no reason for Special Trial Judge Powell to withhold the case from trial except his own concern of being cited in FREYTAG vs COMMISSIONER.

Rule 160, HARMLESS ERROR. No error in either the admission or exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties, is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a decision or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of a case will disregard any error or defect which does not affect the substantial rights of the parties.

The Petitioners, through no fault of their own, have been tasked with paying some $40,000 in interest for the thirty-six month delay in the case proceedings.

Chief Judge Samuel C. Sterrett, in July 1987, stated in a published interview in The Tax Times, that the Tax Court's time frame goal to process cases was one year from petition to trial and one year from trial to decision. This goal should be reached in a year or two.

In this case the petition was filed on 11/10/86 and the case was set for trial on 02/16/88 at Denver, Colorado; a 15 month interval.

The motion by Respondent's attorney in Denver, Colorado, for the production of documents was filed 01/05/88. Petitioners complied with Judge Fay's order of 01/06/88 and sent in their response/objection to Respondent's motion for the production of documents by the deadline of 01/29/88. Judge Fay would not allow the Petitioners' attorney and Petitioners that the response was mailed too late; 01/29/88; the deadline date. Judge Fay was upset that the Petitioners intended to subpoena the three IRS (Internal Revenue Service) agents that had attempted to imprison Petitioner Gary A. Bybee in the IRS office in Cheyenne, Wyoming because

he would not sign an extension agreement for a tax year 1982 audit of which the time period had expired.

The three IRS agents had conspired to falsify the audit of the 1982 and 1984 tax years. They destroyed the Petitioners' IRS Appeal submitted in accordance with IRS Publication 5, and issued the fraudulent notice of deficiency on 9 September 1986. Additionally IRS agent Seay after the 1985 audit had requested Petitioner give him $5,000.00 and he would not be back concerning the 1983 tax year audit.

During the conference call to IRS Attorney Anderson in Denver, Colorado and Petitioner Gary A. Bybee in Layton, Utah, Judge Fay made it clear that the Petitioners should request a change of trial site to Salt Lake City, Utah and emphasized that they should not let any grass grow under their feet in doing so.

The Petitioners complied with Judge Fay's directive and requested the change filed 01/19/88.

The Respondent's motion for production of documents and the Petitioner's motion for protective order was heard on 05/05/88. After the joining report, the case could have been set for trial at the next session scheduled in Salt Lake City on 13 February 1989, had not Special Trail Judge Powell not retained the case for reasons never disclosed to the Petitioners. That would have been a time interval of two years and three months from petition to trial.

When the Taxpayers, now Petitioners, filed their petition with the Court on 11/10/86, they believed that the Court would hear the case and administer justice in compliance with the U.S. Tax Laws. The Petitioners were shocked to find out the Tax Court will not listen to any IRS Tax Code Violation/s prior to the notice of deficiency which the Court accepts as true and correct as filed.

Petitioners did not know of 26 USCS 7214, Offenses by officers and employees of The United States, until after

Judge Clapp II's decision of 25 May 1993, when The FBI alerted them to the law. Additionally, the statute of limitation was tolled by Petitioners' reports to The U.S. Tax Court. Also, violations of 18 USCS § 1001 Statements or Entries Generally, can be applied to this case.

The Respondent and the IRS attorney were fully aware of Special Trial Judge Powell being cited in FREYTAG vs COMMISSIONER and the three year delay in the Petitioners' case. To the present, the Respondent and IRS attorneys have failed to address the three year delay of the Petitioners' case and Judge Clapp II's decision of 05/25/93 that tasked interested for the three years plus period that amounts to some $40,000.00. The current deficiency of taxes, penalties and interest exceeds $150,500.00 as per Judge Swift's current decision of September 17, 1996.

The Tax Court has the power to correct the error in the computation of deficiency in accordance with: 26 USCS § 6214 Determinations by Tax Court. III. PROCEDURE 39. Rules of Tax Court

> Rule of Board of Tax Appeals (now Tax Court) that hearing on computation of deficiency or overpayment is to be confined strictly to consideration of correct computation resulting from determination already made, and that no argument will be heard upon or consideration given to any new issues, is proper exercise of Board's statutory power to prescribe practice in proceedings before it. Bankers Pocahontas Coal Co. v Burnet (1932) 287 US 308, 77 L Ed 325, 53 S Ct 150, 3 USTC 71 998, 11 AFTR 1089; Strother v Burnet (1932) 287 US 314, 77 L ED 330, 53 S Ct 152, 3 UST 71 999, 11 AFTR 1091.

Petitioners request The Court issue an order correcting the Court's decision of 09/17/96; thus deleting the thirty-six (36) months of interest from the deficiency.

U.S. Tax Court Rules of Practice and Procedures, RULE 142. BURDEN OF PROOF (a) General: The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the respondent. As to affirmative defenses, see Rule 39.

The addition of thirty-six months in interest increases the deficiency all because the Petitioners followed the Court Rules.

The Respondent should be required to answer why the thirty-six months of interest should be cited in the decision of September 1996.

The authority for The Tax Court to act on this Petition also rests on the following:

26 USCS § 7459. Reports and decisions. (a) Requirement. A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance so made shall, when entered, be the decision of the Tax Court.

II. FINDINGS OF FACT OR OPINIONS 4. Failure to make findings. Tax Court is required to resolve all material issues before it and make appropriate fact findings upon those issues; if Tax Court fails to make adequate fact findings, appropriate remedy is to remand Tax Court case for such findings. Transport Mfg. & Equipment Co. v

Commissioner (1967, CA8) 374 F2d 173, 67-1 USTC 71 9293, 19 AFTR 2d 889, later app (CA8) 421 F2d 729, 70-2 USTC 71 9604, 26 AFTR 2d 70-5501.

9. Change or correction. Tax Court may change its original findings of fact provided alteration has substantial evidentiary basis. Tehan v Commissioner (1961, CA7) 295 F2d 895, 61-2 USTC 71 9736, 8 AFTR 2d 5723.
III. DECISIONS. 12. Finality and Conclusiveness. Where primary facts are undisputed and only ultimate inferences and legal consequences are in contention, mixed questions of law and fact is presented on which conclusion of Board of Tax Appeals (now Tax Court) in not final. Ross v Commissioner (1942, CA5 Tex) 129 F2d 310, 42-2 USTC 71 9593, 29 AFTR 829.

16. Vacation and correction. Tax Court has power, in its discretion, in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to jurisdiction of court to grant writ of error coram nobis. Reo Motors, Inc. v Commissioner (1955, CA6) 219 F2d 610, 55-1 USTC 71 49090, 46 AFTR 1740.

The deletion of the thirty-six months in the computation of the interest due on deficiencies entered in the decision of September 17, 1996, will afford the Petitioners their substantial rights and correct the substantial injustice. It releases the Petitioners from an unjust financial burden which resulted

from their following the Tax Court directives of which they have no control.

WHEREFORE, Petitioners pray that the Court approve the motion to correct/delete interest imposed because of Special Trial Judge Powell's three year plus delay of Petitioner's case.

"s/Gary A. Bybee"
"s/Frances Bybee"

U.S. TAX COURT
DENIED
NOV. 6, 1996

"s/Stephen J. Swift" Judge

§195. Start-up expenditures.

(a) Capitalization of expenditures. Except as otherwise provided in this section, no deduction shall be allowed for start-up expenditures.

(b) Election to amortize. (1) In general. Start-up expenditures may, at the election of the taxpayer, be treated as deferred expenses. Such deferred expenses shall be allowed as a deduction prorated equally over such period of not less than 60 months as may be selected by the taxpayers (beginning with the month in which the active trade or business begins).

(2) Dispositions before close of amortization period. In any case in which a trade or business is completely disposed of by the taxpayer before the end of the period to which paragraph (1) applies, any deferred expenses attributableto such trade or business which were not allowed as a deduction by reason of this section may be deducted tothe extent allowable under section 165.

(c) Definitions. For purposes of this section —

(1) Start-up expenditures. The term "start-up expenditure" means any amount —

(A) paid or incurred in connection with —

(i) investigating the creation or acquisition of an active trade or business, or

(ii) creating an active trade or business, or

(iii) any activity engaged in for profit and for the production of income before the day on which the active trade or business begins, in anticipation of such activity becoming an active trade or business, and

(B) which, if paid or incurred in connection with the operation of an existing active trade or business (in the same field as the trade or business referred to in

subparagraph (A)), would be allowable as a deduction for the taxable year in which paid or incurred.

The term "start-up expenditure" does not include any amount with respect to which a deduction is allowable under section 163 (a), 164, or 174.

(2) Beginning of trade or business. (A) In general. Except as provided in subparagraph (B), the determination of when an active trade or business begins shall be made in accordance with such regulations as the Secretary may prescribe.

(B) Acquired trade or business. An acquired active trade or business shall be treated as beginning when the taxpayer acquires it.

§6213. Restrictions applicable to deficiencies; petition to Tax Court.

(a) Time for filing petition and restriction on assessment. Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42,43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayers, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined

by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

§6653. Failure to pay stamp tax.

Any person (as defined in section 6671(b) who —

(1) willfully fails to pay any tax imposed by this title which is payable by stamp, coupons, tickets, books, or other devices or methods prescribed by this title or by regulations under the authority of this title, or

(2) willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a penalty of 50 percent of the total amount of the underpayment of the tax.

§6661. Substantial understatement of liability. Repealed in 1989.

> "The Secretary may waive all or any part of the addition to tax provided by this section on a showing by the taxpayer that there was reasonable cause for the understatement (or part thereof) and that the taxpayer acted in good faith."

Abatement is made in accordance with Internal Revenue Service 26 U.S.C.S. Section 6404. Abatements.

§6404. Abatements.

(a) General rule. The Secretary is authorized to abate the unpaid portion of the assessment of any tax or any liability in

respect thereof, which —

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of the period of limitation properly applicable thereto, or

(3) is erroneously or illegally assessed.

(b) No claim for abatement of income, estate, and gift taxes. No claim for abatement shall be filed by a taxpayer in respect of an assessment of any tax imposed under subtitle A or B.

(c) Small tax balances. The Secretary is authorized to abate the unpaid portion of the assessment of any tax, or any liability in respect thereof, if the Secretary determines under uniform rules prescribed by the Secretary that the administration and collection costs involved would no warrant collections of the amount due.

(d) Assessments attributable to certain mathematical errors by Internal Revenue Service. In the case of an assessment of any tax imposed by chapter 1 attributable in whole or in part to a mathematical error described in section 6213 (g)(2)(A), if the return was prepared by an officer or employee of the Internal Revenue Service acting in his official capacity to provide assistance to taxpayers in the preparation of income tax returns, the Secretary is authorized to abate the assessment of all or any part of any interest on such deficiency for any period ending on or before the 30th day following the date of notice and demand by the Secretary for payment of the deficiency..

(e) Assessments of interest attributable to errors and delays by Internal Revenue Service. (1) In general. In the case of any assessment of interest on —

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

(2) Interest abated with respect to erroneous refund check. The Secretary shall abate the assessment of all interest on any erroneous refund under section 6602 until the date demand for repayment is made, unless —

(A) the taxpayer (or a related party) has in any way caused such erroneous refund, or

(B) such erroneous refund exceeds $50,000.

(f) Abatement of any penalty or addition to tax attributable to erroneous written advice by the Internal Revenue Service. (1) In general. The Secretary shall abate any portion of any penalty or addition to tax attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the Internal Revenue Service, acting in such officer's or employee's official capacity.

(2) Limitations. Paragraph (1) shall apply only if —

(A) the written advice was reasonably relied upon by the taxpayer and was in response to a specific written request of the taxpayer, and

(B) the portion of the penalty or addition to tax did not result from a failure by the taxpayer to provide adequate or accurate information.

(3) Initial regulations. Within 180 days after the date of the enactment of this subsection, the Secretary shall prescribe such initial regulations as may be necessary to carry out this subsection.

§7214. Offenses by officers and employees of the United States.

(a) Unlawful acts of revenue officers or agents. Any officer or employee of the United States acting in connection with any revenue law of the United States —

(1) who is guilty of any extortion or willful oppression under color of law; or

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or

(3) who with intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment; or

(4) who conspires or colludes with any other person to defraud the United States; or

(5) who knowingly makes opportunity for any person to defraud the United States; or

(6) who does or omits to do any act with intent to enable any other person to defraud the United States; or

(7) who makes or signs any fraudulent entry in any book, or makes or signs any fraudulent certificate, return, or statement; or

(8) who, having knowledge or information of the violation or any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to the Secretary; or

(9) who demands, or accepts, or attempts to collect, directly or indirectly as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do;

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

18 U.S.C.S.

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 749.)

§7802. Commissioner of Internal Revenue; Assistant Commissioner (Employee Plans and Exempt Organizations).

(a) Commissioner of Internal Revenue. There shall be in

the Department of the Treasury a Commissioner of Internal Revenue, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioner of Internal Revenue shall have such duties and powers as may be prescribed by the Secretary of the Treasury.

(b) Assistant Commissioner for Employee Plans and Exempt Organizations. (1) Establishment of Office. There is established within the Internal Revenue Service an office to be known as the "Office of Employee Plans and Exempt Organizations" to be under the supervision and direction of an Assistant Commissioner of Internal Revenue. As head of the Office, the Assistant Commissioner shall be responsible for carrying out such functions as the Secretary may prescribe with respect to organizations exempt from tax under section 501(a) and with respect to plans to which part I of subchapter D of chapter 1 applies (and with respect to organizations designed to be exempt under such section and plans designed to be plans to which such part applies).

(2) Authorization of appropriations. There is authorized to be appropriated to the Department of the Treasury to carry out the functions of the Office an amount equal to the sum of —

(A) so much of the collections from taxes imposed under section 4940 (relating to excise tax based on investment income) as would have been collected if the rate of tax under such section was 2 percent during the second preceding fiscal year; and

(B) the greater of —

(i) an amount equal to the amount described in paragraph (A); or

(ii) $30,000,000.

(c) Assistant Commissioner (taxpayer services). There is established within the Internal Revenue Service an office to

be known as the "Office of Taxpayer Services" to be under the supervision and direction of an Assistant Commissioner of the Internal Revenue. The Assistant Commissioner shall be responsible for taxpayer services such as telephone, walk-in, and taxpayer educational services, and the design and production of tax and informational forms.

§7805. Rules and regulations.

(a) Authorization. Except where such authority is expressly given by this title to any person other than an officer or employee of the treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations or rulings. The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

(c) Preparation and distribution of regulations, forms, stamps, and other matters. The Secretary shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue.

(d) Manner of making elections prescribed by Secretary. Except to the extent otherwise provided by this title, any election under this title shall be made at such time and in such manner as the Secretary shall by regulations or forms prescribe.

(e) **Temporary regulations. (1) Issuance.** Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation.

(2) 3- Year duration. Any temporary regulation shall expire within 3 years after the date of issuance of such regulations.

RULE 183. CASES INVOLVING MORE THAN $10,000[1]

Except in cases subject to the provisions of Rule 182 or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:

(a) Trial and Briefs: A Special Trial Judge shall conduct the trial of any such case assigned for such purpose. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.

(b) Special Trial Judge's Report: After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge or Division of the Court.

(c) Action on the Report: The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstances that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the finding of fact recommended by the Special Trial Judge shall be presumed to be correct.

---

[1]The amendments are effective as of July 1, 1990.

Public Law 105-206
Passed by Congress 07/22/98

Title III: Taxpayer Protection and Rights - Taxpayer Bill of Rights 3 - **Subtitle A: Burden of Proof** - Places the burden of proof in any court proceeding, with respect to any factual issue relevant to ascertaining the income tax liability of a taxpayer, on the Secretary, but only if: (1) the taxpayer has complied with applicable substantiation requirements; (2) the taxpayer has maintained all required records and has cooperated fully with the Secretary with respect to an issue; and (3) in the case of a partnership, corporation, or trust meets the IRC definition of the term prevailing party.